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No. 20.

Queen's Bench,

APPELL SIDE.

JAMES POLLEY,

Appellant,

DOMINIQUE P. HENRI,

Respondent.

RESPONDENT'S CASE.

1880.

1880.



MOVING  
LOANS  
ABSTRACT

# Court of Queen's Bench.

## APPEAL SIDE.

NO. 56.

JAMES FOLEY,

(Defendant in the Court below.)

APPELLANT,

AND

DOMINIQUE D. BENKIN,

(Plaintiff in the Court below.)

RESPONDENT.

## RESPONDENT'S CASE.

This is an appeal from a judgment rendered in the Superior Court at Montreal, on the 30th day of November 1869, by the Honorable Mr. Justice RADLEY, maintaining in part only the demand of the Respondent as set forth in his declaration, and that on certain conditions hereafter set forth.

The action in the Court below was brought to recover the sum of £308.0.4 cy. and interest from the 1st day of March 1869, and the claim is thus set up in the Respondent's Declaration.—“That at all and every the times and periods hereinafter mentioned the said Plaintiff was such manufacturer of fire arms carrying on trade and commerce as such at Liège aforesaid, under the name or firm of Benkin Frères, and at the same times and periods, the said Defendant was such merchant as aforesaid.

That, on or about the ninth day of March Eighteen hundred and fifty-seven, at Liège aforesaid, it was agreed between the Plaintiff and Defendant that the former should consign to the latter such guns and pistols as the Plaintiff might wish to have sold in the Canada Market, to be sold by the Defendant, the latter to be allowed a guarantee commission of seven and a half per cent on such sales, and in consequence thereof, that he the said Defendant should and he thereby agreed to guarantee the due payment of all such sales at the several periods, when they should respectively fall due, and to remit the proceeds of such sales, after deduction of all charges and commission in due course to the Plaintiff by Bill or Draft for the same payable at a Bankers in London in England.

That in accordance with such agreement the said Plaintiff from time to time consigned to the said Defendant large quantities of guns and pistols, which he the said Defendant sold.

That by the account-sales rendered by the said Defendant to the said Plaintiff respecting such sales, and by the account current also rendered by the Defendant to the Plaintiff, which are all herewith produced and filed, and to which the Plaintiff particularly refers as forming part hereof, it would appear, as the fact was and is, that he the said Defendant was indebted to the said Plaintiff on the twenty-seventh day of March Eighteen hundred and fifty-eight, in the sum of Sixty-nine pounds, seventeen shillings and eight pence, Sterling money of Great Britain; on the fifteenth day of May Eighteen hundred and fifty-eight, in the sum of One hundred and Thirty pounds thirteen shillings and eight pence Sterling money aforesaid; on the tenth day of June Eighteen hundred and fifty-eight, in the sum of One hundred and Sixty-two pounds seven shillings Sterling money aforesaid, and on the tenth day of August Eighteen hundred and fifty-eight, in the sum of Ninety-one pounds, six shilling and ten pence Sterling money aforesaid, and this after deduction of the Defendant's commission, and of all charges whatsoever fairly chargeable on such consignments.



That the only remittances or payments made by the said Defendant on account of his said indebtedness, are one Bill or Draft on Sheffield in England for Sixty-nine pounds nineteen shillings and eight pence Sterling, and another Draft or Bill on Messrs Cross & Sons England, for One hundred and Eighty-six pounds, fourteen shillings and five pence Sterling. And after giving credit for these amounts the said Defendant is presently indebted to the Plaintiff, for the causes aforesaid, and for balance of interest on such sales aforesaid after due, in the sum of Two hundred and nineteen pounds, five shillings and nine pence Sterling, and interest thereon since the first day of March instant, as shown more fully by the account current herewith filed, which said amount last mentioned, at the current rate of exchange between this city and England aforesaid, (which the Plaintiff avers to have averaged and to be presently one per cent premium or advance) is equivalent to Two hundred and Sixty-eight pounds and four pence currency."

Then followed the general *indebitatus assumpsit* Counts.

The following is the Plea set up by the Appellant:—

"The Defendant for plea to the Plaintiff's action, saith, that under and by virtue of an agreement made at Liège in Plaintiff's Declaration mentioned on the ninth March Eighteen hundred and fifty-seven, between the Defendant and the Plaintiff, it was understood and agreed that the Plaintiff was to consign to the Defendant all the guns &c. for the Canada Market or trade, the Defendant agreeing to render an account sales monthly of the guns sold, and also if the amount should be sufficiently large, to send the Plaintiff a Bill or Draft for the amount payable at a Banker's in London; that in conformity with the said agreement the Plaintiff consigned at divers times, subsequent to that date, to the Defendant large quantities of guns and pistols for sale for the Plaintiff on consignment in Canada, upon which the Defendant paid and disbursed large sums of money for duties payable and other charges, to wit the sum of Two hundred pounds currency; that by the said agreement the said Defendant was to receive a reasonable commission for the sale of the said goods, and for all incidental trouble, and was and is entitled thereto, to wit the sum of Sixty pounds; but the said Defendant saith that the said agreement did not contemplate nor did the Defendant at any time agree to warrant the sales, nor was such commission a guarantee commission, and the Defendant saith that the said Defendant sold certain of the said goods and furnished account sales thereof, and remitted large sums of money, to wit the various sums credited in the exhibits of the said Plaintiff filed in this cause; that the Plaintiff's exhibits one (1), two (2), three (3) and four (4) contain the said account sales, that after said sales divers of said guns and goods were returned and thrown back into the possession of the said Defendant which were not paid for and were moreover in bad condition and order, and never have been realized for by the said Defendant, and the same are still on hand unsold, and unsaleable, amounting in all to the value and sum of One hundred and Ninety-seven pounds, thirteen shillings and one penny Sterling, the whole as per list, herewith filed, which said goods the Defendant hath offered to return to the Plaintiff, and hath always been and still is ready to return and give up the same and hereby offers to deliver the same to the Plaintiff or to his agent in that behalf, that in fact the said Defendant rendered the said account sales to the Plaintiff and remitted him the full value of the goods sold and realized by Defendant, and the said Defendant is not now indebted to him the said Plaintiff in the sum of money demanded by this action, or any part thereof, but has the said goods, ready to be delivered to his order, of all which the Plaintiff was duly notified; that save and except as hereinbefore mentioned, all, each and every the allegations, matters and things in the Plaintiff's Declaration set forth and contained are untrue.

Wherefore the said Defendant prays acts of his readiness and offers to deliver and restore the said goods, so on hand to the Plaintiff or his agent, and prays the dismissal of Plaintiff's action with costs of which *detracts* to the undersigned Attorneys."

The Respondent answered, "that true it is (as stated in said plea) that the Defendant agreed to render an account sales monthly of the guns sold, and also, if the amount would be sufficiently large, to send the Plaintiff a Bill or Draft for the amount payable at a Banker in London, but, with that exception, and except also in so far as the allegations of the said plea exactly correspond with the allegations in the Plaintiff's Declaration contained, all and every the allegations, matters and things in the said plea set forth and contained, are false, untrue and unfounded in fact, and the said Plaintiff hereby expressly denies the same and each and every thereof, and the same are moreover insufficient in law."

The commission charged in the account sales and account current rendered by the Appellant is a commission of 7½ per cent, which the Respondent established, by the evi-

Under the circumstances, the Respondent was clearly entitled to a simple condemnation against the Appellant, for the full amount of his demand, but instead thereof the learned Judge who heard the case in the Court below rendered the following judgment:—

Montreal, 16th Decr. 1868.

Statement of Guns and Pistols held to the order of Messrs. Renkin, Freres, Liege  
by James Foley.

[illegible]

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Considering that the Defendant hath acknowledged to have received since the date of the said statement in Plaintiff's account of the said goods in the said statement mentioned the sum of Forty pounds and five pence, from the sale of part of the said goods so held as aforesaid—leaving in Defendant's hands of the said goods a balance amounting to the sum of Two hundred and Twenty-one pounds three shillings and one penny, and considering that it is admitted by the pleadings and established of Record that the said Defendant is indebted to the said Plaintiff, in the further sum of Sixty pounds currency, forming together with the said sum of Forty pounds the gross sum of One hundred pounds, wherefrom deducting the commission in the account set out in the said statement, there actually was due in cash to the Plaintiff at the institution of this action the sum of Eighty pounds eight shillings and three pence, besides the goods in hand as aforesaid, doth adjudge and condemn the Defendant to pay to the said Plaintiff the sum of Eighty pounds eighteen shillings and three pence, together with the said sum of Two hundred and twenty-one pounds three shillings and one penny, amounting together to Three hundred and one pounds eleven shillings and four pence, with interest on the said several sums, from the fifth day of March One thousand eight hundred and fifty-nine, date of the service of this action, unless the Defendant do within eight days from the service of this Judgment upon him, deliver up to the Plaintiff the balance of the said goods in the said statement mentioned, less those for which the said sum of Forty pounds have been by him received, whereupon the said Defendant shall only be held to pay to the Plaintiff the said sum of Eighty pounds eighteen shillings and three pence with interest as aforesaid, the whole with costs to be taxed as in a contested action of first class."

The Respondent considering as before stated that he was entitled to a simple condemnation against the Appellant, according to the conclusions of his declaration, has also Appealed from the said judgment, such Appeal bearing the number 73 amongst the records of this Court. Under any circumstances the Respondent respectfully submits, that the present Appeal which seeks to reverse the judgment of the Court below in *1860*, cannot be maintained.

*Beaumont & Guerin*  
*per Messrs*

Montreal, 9th August 1860.

Depositions of witnesses examined in Court below by Respondent.

JAMES HUTTON:—I am now, and during the last Seventeen years have been, a Commission Merchant carrying on business as such in this City. My business has been entirely confined to that of hardware. During the whole of the above period, the uniform rate of Commission for selling Merchandise without guarantee, has been Five per cent, and with guarantee an additional Commission of two and a half per cent. These rates cover every description of trouble, including that of remitting. I am a member of the Montreal Board of Trade, and I now produce a printed copy of the rates of Commission, sanctioned by that body.

Cross-Examined.

All consigned goods are subject to be returned as a matter of course if unsold or unmarketable.

Re-Examined.

Should an account sales be rendered of consigned goods and the charge of seven and a half per cent be made, the debt is of course guaranteed.

JOHN G. DINWIDDIE:—I am now and during the last four or five years have been Secretary of the Montreal Board of Trade. For many years previously, I was engaged in the General Commission business in this City. The uniform rate of Commission for selling Merchandise in this City without guarantee, has been during my experience Five per cent, and with guarantee an additional commission of two and a half per cent. These charges include every description of trouble, including that of remitting. The paper produced by James Hutton is a true copy of the rates of Commission sanctioned by the Board of Trade, so far as the Commissions of the above character are concerned.

Defendant declines Cross-Examination.

THOMAS WORKMAN:—I am now and during the last twenty-five years have been engaged in the Hardware business in this City. During that time I have frequently sold goods on Commission. When nothing is specially agreed to the contrary, seven and a half per cent Commission has been always considered as a guarantee or *del credere* Commission. This Commission is considered to cover every description of trouble including that of remitting money.

The Defendant declines Cross-Examination.



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